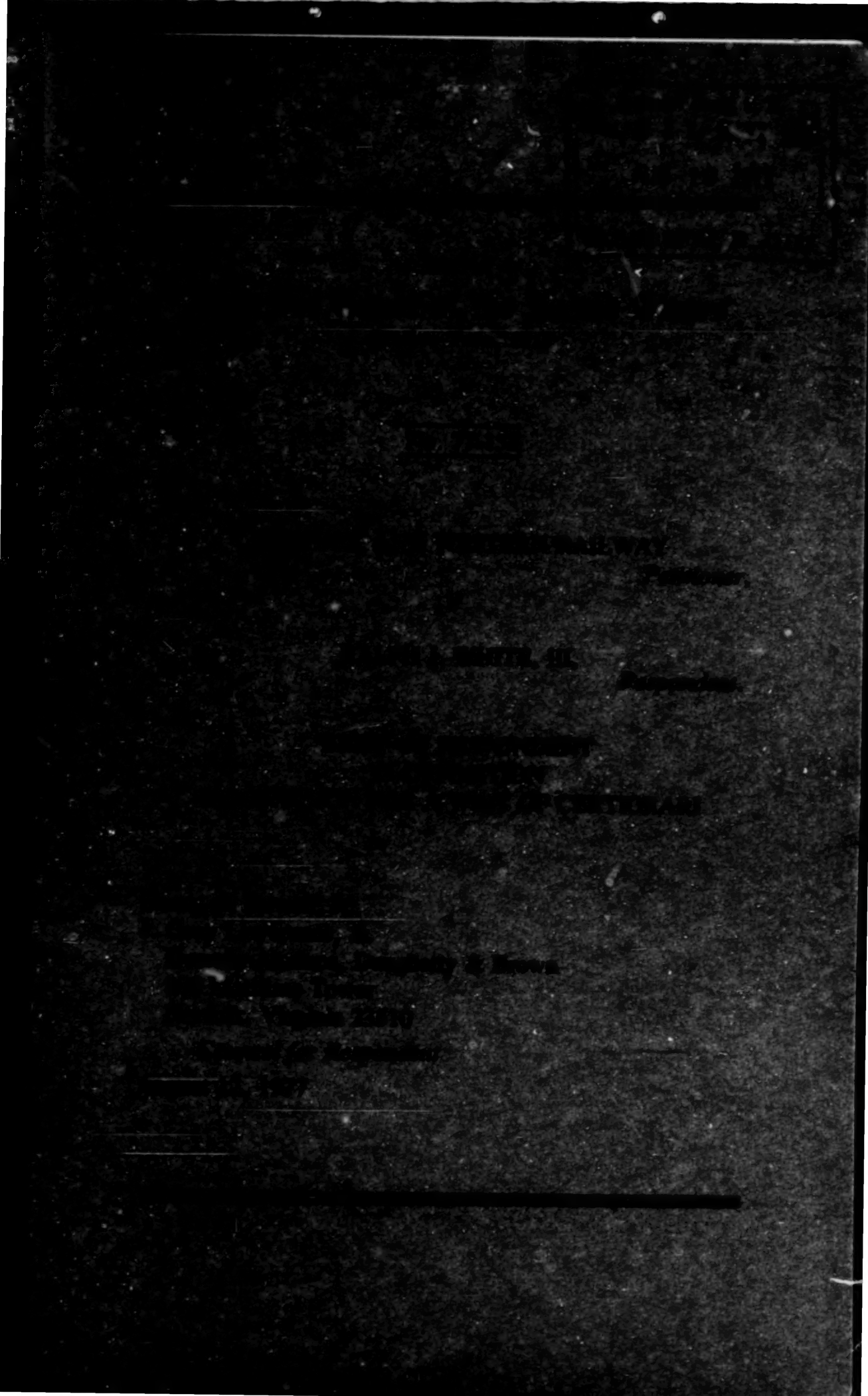

INDEX

	Page
QUESTION PRESENTED	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	4
CONCLUSION	17
CERTIFICATE OF SERVICE	18

CITATIONS

Cases:

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d (1972)	12
Maher Terminal, Inc. v. Farrell, F. 2d 478 (3d Cir. 1977)	9,10
Nacirema Operating Co. v. Johnson, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed. 2d 371 (1969)	13
Northeast Marine Terminal Co., Inc. v. Caputo, 45 U.S.L.W. 4729 (1977), Nos. 76-444 and 76-454	passim
Sea-Land Service v. Director, 540 F. 2d 629 (3d Cir. 1977)	12

Seas Shipping Co. v. Sieracki, 328 U.S.85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) 11

Stockman v. John T. Clark & Son of Boston, 539 F. 2d 264 (1st Cir. 1976) 14

Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 1030, 93 L.Ed. 1283 (1949) 6

Victory Carriers, Inc. v. Law, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed. 2d 383 (1971) 11

Weyerhauser Co. v. Gilmore, 528 F. 2d 9576 (9th Cir. 1976), cert. denied, ___U.S.___ (1976) 10,12, 13,14

Legislative History:

Cong. Rec. 36385, Part 27 (1972) 10

S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972); H.D.Rep. No. 92-1146, 92nd Cong., 2d Sess., 1972 U.S. Code Cong. & Admin News, pp. 4707-08 8,15

Statutes:

Federal Employers Liability Act, 45 U.S.C. §1 et seq. 6

Longshoremen's and Harbor Workers' Compensation Action, 33 U.S.C. §901 et seq. 2

Treatises:

1A Benedict on Admiralty (1977 Supp.) §16, p. 2-3 14

1 Norris, The Law of Maritime Personal Injuries (3d ed. 1975) §3, p.6 5

Gilmore and Black, The Law of Admiralty (2d ed. 1975), p. 430 10

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-158

NORFOLK AND WESTERN RAILWAY,

Petitioner,

v.

RALPH J. WHITE, III,

Respondent.

BRIEF OF RESPONDENT RALPH WHITE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the respondent Ralph White, a railroad electrician, was an "employee" within the meaning of that term in the Longshoremen's and Harbor Workers' Compensation Act (hereafter, "the Act") when he sustained hearing loss in various electrical rooms of the

petitioner, while he was maintaining electrical equipment which provided power to machinery which loaded coal aboard ships at the petitioner's Lamberts Point coal piers, and even though he did not actually operate the loading machinery.

STATUTE INVOLVED

Petitioner's citation of Section 2(3) of the Longshoremen's and Harbor Workers; Compensation Act, 44 Stat. 1424, as amended 86 Stat. 1251, 33 U.S.C.§902(3) (Supp. V 1975) should be expanded to read:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker...

Section 3 of the Act, 44 Stat. 1426, as amended, 96 Stat. 1251, 1265, 33 U.S.C.§903(a) (Supp. V 1975) should also be included:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury

> occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)...

STATEMENT OF THE CASE

As petitioner states, the facts are essentially undisputed. However, petitioner's statement of the case fails to mention that the respondent Ralph White did not customarily operate, nor was operating at the time of his injuries, any of the machinery which actually transferred coal from one point to another and loaded it on board vessels. Further, no evidence was adduced at the jurisdictional hearing in the Circuit Court of Norfolk as to how much time White spent in electrical maintenance of the telescopic loading chutes and their "trimming" systems nor as to the amount of time spent on vessels when it was necessary to repair the loading chute with a vessel in berth. He also maintained a transformer bank which furnished electrical power to a pusher, a device which indexed the railroad cars to allow the barney to take the cars at the dumper. This transformer bank is located near the thawing chamber, back from the pier area. (For a description of the layout of the Lamberts Point area, see A.6f to

petition for a writ of certiorari) A witness for the petitioner, Mr. Johannes Hoffman, the railroad's assistant general foreman of the piers, testified in August, 1975, that he had seen Ralph White on the railroad's barge only six times that year and did not remember seeing him in 1972, 1973 or 1974. (Suit was filed June 26, 1974, in the Circuit Court of the City of Norfolk.) Petitioner's statement also does not mention that the respondent, as an electrician, was at various times assigned to areas in the petitioner's railroad yard other than the piers. At the time of the trial on the FELA action - in November, 1974 - he was working as an electrician in the petitioner's diesel shop.

THERE IS NO GOOD REASON TO GRANT REVIEW

Petitioner contends that review should be granted to the decision of the Supreme Court of Virginia because of what the petitioner perceives as inconsistencies between the "maritime employment" test of coverage employed by that court and this Court in Northeast Marine Terminal Co., Inc. v. Caputo 45 U.L.L.W. 4729 (1977), Nos. 76-444 and 76-454. In fact, the case was correctly decided by the Virginia Supreme Court in accord with the principles enunciated by this Court in Caputo. Both Caputo and Blundo would be covered under the rationale of the Virginia Supreme Court, as they were by this Court. Far from undermining this Court's definition of "maritime employment", the Virginia Supreme Court

derived principles for determining "maritime employment" in a situation which this Court in Caputo did not have occasion to address, where the work out of which the injury arose was not work which, like longshoring (defined by one commentator as the loading or unloading of ship's cargo, 1 Norris, The Law of Maritime Personal Injuries, (3d ed. 1975), §3, p.6) has traditionally been considered maritime in nature or where, put another way, the injured worker was not directly involved in the loading or unloading process.

Blundo, this Court will recall, was injured when he slipped on ice on a pier while marking cargo stripped from a container. His occupation was that of a cargo checker, which involved breaking the seal on a cargo container which had been unloaded, checking the contents against a cargo manifest, and marking each item of cargo with an identifying number. Caputo was injured while working at "terminal labor" and particularly while rolling a dolly loaded with cheese into a consignee's truck.

In contrast is the case of Ralph White, who never checked cargo nor operated, except occasionally to test, the machinery which loaded coal onto vessels waiting at Pier 5 or 6 to receive it nor ever assisted in loading operations.

The Court in Caputo affirmed an extension of coverage to workers whose duties had always been considered maritime and which had historically been performed within a maritime situs, i.e., upon navigable waters. It was an extension justified by technological

changes in the loading and unloading process; for the essential character of longshoring work, as this Court noted, had not changed, but only its place and procedure. Caputo, supra, at 4735, fn. 32. Such a justification is not applicable here, where the work of Ralph White, the work of a railroad electrician, has never, because of technological progress, moved inland from an historic maritime situs. Petitioner would have this Court extend coverage to workers not traditionally or customarily maritime and, in placing undue influence on what it sees as certain objectives of the 1972 amendments, would write the requirement of maritime employment out of the Act.

This Court has been alert over the years to protect the rights of a railroader under the Federal Employers Liability Act (hereafter, "FELA") 45 U.S.C.§51 et seq. In Urie v. Thompson, 337 U.S.163, 69 S.Ct. 1018, 1030, 93 L.Ed. 1283 (1949) it spoke of "the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court". The FELA, first passed in 1908 and amended in 1910 and 1939, provides that any common carrier while engaging in interstate or foreign commerce - such as the petitioner Norfolk & Western - shall be liable in damages for personal injuries or death suffered by an employee- such as Ralph White - "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,

machinery, tracks, roadbeds, boats, wharves or other equipment" (emphasis added).

While it is conceded that the Longshoremen's and Harbor Workers' Compensation Act is the exclusive remedy as to those employees to whom it is found to apply, even though they may be railroaders, this Court should not be quick to divest Ralph White of his FELA rights when that act, like the Longshoremen's and Harbor Workers' Compensation Act, is a piece of remedial legislation entitled to liberal construction for the benefit of the employee.

This Court, as have other courts which have considered the 1972 amendments, has placed much reliance on the legislative history to determine Congressional intent regarding coverage of the Act. The committee reports are crystal clear that Congress did not intend to cover everyone injured in the "situs":

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters.

> The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment... (Emphasis added)

S.Rep. No. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1446, 92nd Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News, pp. 4707-08. The obvious intention not to cover certain persons, even though engaged in work in the "situs", belies petitioner's contention that this Court apply a "but for"

test of coverage - if loading could not take place but for the activities of the injured person, he should be covered. Clerical employees are obviously an essential part of loading and unloading, and the processes could not operate properly without them; yet, they are not covered. Maher Terminals, Inc. v. Farrell, 548 F2d 478 (3d. Cir. 1977). Although this Court in Caputo noted the Act's emphasis on occupations, it recognized that a worker to be covered by the Act must be engaged in maritime employment at the time of his injuries. Caputo, supra at 4733.

With regard to loading and unloading functions (traditionally the work of the longshoreman), Congress obviously sought to draw the coverage line between those employees directly involved in such functions and those who were not. As Gilmore and Black interpret this intention:

> The line which the Committee Reports evidently sought to draw was between workers who participated directly, or physically, in the specified activities and workers whose jobs require them to be in the same area but who (like clerical workers) do not "physically" participate or who (like truckers) can be thought of as only indirectly involved in the strict maritime phase

of the activity.

The Law of Admiralty (2d ed. 1975), p. 430. The direct-indirect distinction was one which this Court in Caputo did not have to consider. Blundo broke the seals on, and checked the contents of, cargo containers. He checked the contents against the cargo manifest and put an identifying number on each item of cargo. Caputo was physically moving cargo into the truck of a consignee. Thus, both employees were directly involved in the loading and unloading of cargo and, indeed, both actually handled the cargo. In the case at bar, the Virginia Supreme Court was faced with a situation where there was no such direct relationship. The criteria which it adopted are supported in the Committee reports and in Caputo and other decisions of this Court.

In Caputo, this Court noted that Act's emphasis on occupations - longshoreman, harbor worker, ship repairman, ship builder or shipbreaker - 45 U.S.L.W. at 4735, 4736. How then does one define these occupations? The logical manner of doing so would be by referring to their traditional, customary tasks, see the remarks of Representative William Steiger, 118 Cong. Rec. 36385, Part 27 (1972) quoted in Weyerhauser, infra at 960) ("The expansion of coverage is intended to bring about a measure of compensation uniformly applicable to persons customarily considered to be working in the business".) In determining a worker's occupational status, his primary, not his incidental, duties are to be considered, Maher Terminals, Inc. v. Farrell, supra at 478. The petitioner concedes that the majority

of Ralph White's time was spent in the electrical rooms where he suffered his hearing loss maintaining the equipment which furnished power to the loading apparatus. Such work has never been considered a part of any occupation set forth in the Act.

In Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), the warranty of seaworthiness was extended to longshoremen injured pierside because they performed work which was traditionally the work of the ship's service, and performed by members of the crew. This Court has, on several occasions, analyzed the remedies of longshoremen with reference wot the parameters of admiralty jurisdiction, which it has in turn defined by reference to traditional maritime activity. In Victory Carriers, Inc. v. Law, 404 U. S. 202, 92 S.Ct. 418, 30 L.Ed. 2d 383 (1971), it refused to extend the warranty of seaworthiness and federal maritime law to a longshoreman injured pier-side by the pier-based equipment of the stevedore. In doing so, it empha-sized that the reach of admiralty had not historically extended to the land. Part of Congress' concern in passing the 1972 amendments was no doubt to allay the harshness of the rule which provided coverage to workers traditionally within admiralty jurisdiction who, at the moment of their injury, may have walked out of coverage because of the expanded geo-graphical limits which technology had given to their work. This problem was solved by broadening the "situs" area of coverage, not redefining "maritime". The Court also rejected an expansive definition of the loading and unloading process by the Court of Appeals as "difficult to delimit", 92 S.Ct. 418

fn. 14. The same might be said of petitioner's analysis in the instant case. If this Court were to hold the respondent - who was not at the time of his injuries engaged in traditional maritime activity nor directly involved in the loading process, which is a traditional maritime activity - was engaged in "maritime employment", the line which Congress tracked would never be drawn, and the requirement of "maritime employment" rendered a nullity.

In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed. 2d 454 (1972), petitioners sought to invoke the admiralty jurisdiction of the federal courts for an action, grounded in negligence, allegedly causing the crash of an airplane into the navigable waters of Lake Erie. This Court there sustained the dismissal of the action, holding that before the maritime jurisdiction of the federal courts could be asserted, there must be a "significant relationship to traditional maritime activity," 93 S. Ct. at 504. No such relationship was found to exist in that case. No such relationship exists here. The decisions are important because it was in the exercise of its maritime jurisdiction that Congress passed the act and the 1972 Amendments, see Weyerhauser Co. v. Gilmore, 528 F. 2d 957, 961 (9th Cir. 1976) cert. denied, ___U.S. _____ (1976); Sea-Land Service v. Director, 540 F. 2d 629, 635 (3d Cir. 1977), and references to that jurisdiction are helpful in defining the term "maritime employment". The court in Weyerhauser and the Supreme Court of Virginia, in positing as an aspect of the "maritime employment" test the requirement of

"realistically significant relationship to traditional maritime activity" were but reiterating the essential basis of Congressional action over "maritime" employees. "Traditional maritime activity" includes the statutory occupational classifications. At the same time it is a convenient and workable yardstick for determining those occupational categories which do not constitute "maritime employment". It would be a novel expansion of the term "longshoreman" or "longshoring operations" that would include Ralph White, a railroad electrician, within it, yet that is apparently petitioner's objective in seeking to characterize Ralph White's activities as essential, integral parts of the loading process.

Weyerhauser accurately give effect to the Congressional intent evident in the Committee Reports and restates the maritime boundaries recognized in previous decisions of this Court. Petitioner's suggestion that the case is wrongly decided because it excludes workers who prior to 1972 may have been included under the mantle of the Act obviously flies in the face of the Congressional intent not to cover some workers injured in the situs area - contrary to the result which would have been reached under the pre-1972 Act - and also the clearly expressed requirement, introduced into the Act for the first time in 1972, that an employee at the time of his injuries be engaged in maritime employment. (Petitioner's complaint, in any event, would not be applicable in the case of the injuries suffered by Ralph White. Those injuries would not be covered under the pre-1972 Act, Nacirema Operating Co. v. Johnson, 396 U.S. 212, 90 S.Ct. 374, 24 L. Ed. 2d 371 (1969), where it was held that

injuries to a longshoreman occurring on a pier were not covered even though the pier extended into navigable waters.) Further, petitioner's characterization of the claimant in that case as one engaged solely in the manufacturing process misreads the case. Logs were transported to the sawmill by a tug and barge and were tied up to floating docks. Weyerhauser employees then moved the logs to the mill for debarking. After debarking, the logs were dropped back into the water, routed to ponds where they were sorted by pondmen such as the claimant and fed into the mill for processing into lumber or plywood. The finished product was then loaded aboard ship. If petitioner's analysis were applied, contrary to its assertion that the case is wrong, the Weyerhauser claimant would be covered under the Act, since he was in in a covered situs and since the loading and unloading processes could not have operated without him. But as the court there found. claimant "had no duties receiving the log rafts at the docks, operating the log broncs, initially moving the logs into the mill for debarking or loading ships with the finished product". This Court denied certiorari. Benedict cites the case as "an illustration of basic principles required for coverage", and believes that the other circuits would not seem to quarrel with the holding, 1A Benedict on Admiralty §16, p.2-3 (1977 Supp.). Weyerhauser's reference to traditional maritime work, in fact, was also made in Stockman v. John T. Clark & Son of Boston, 539 F. 2d 264, 275, 276 (1st Cir. 1976).

Another aspect of the "maritime employment" test, when applied to the typical longshoring functions of loading

and unloading, is the evident Congressional intent to cover employees who, like checkers, are "directly involved" in such functions, see the Committee Reports, quoted supra at page 7 - 8. The language was inserted in the Committee Reports, it may be surmised, to give effect to the Congressional intention to cover traditional maritime activities which had moved into new areas and had adopted new procedures as a result of technological advancements. It does not, obviously, eliminate the necessity of determing what is maritime employment nor detract from the Act's occupational emphasis. It does, on the facts of the instant case, require that the respondent participate directly or physically in the loading process. In truth, Ralph White was at least one step removed from such participation. Petitioner's inclusion of Ralph White in the class of employee "directly involved" in the loading process - as he must be at the least in order to come within the Act - strains the terminology beyond its meaning as evident from the Committee Reports. If Ralph White is directly involved in the loading process, it is difficult to see who would not be.

Petitioner's argument on page 12 of its brief entirely misses the mark. The existence of a shipowner's warranty of seaworthiness is irrelevant to whether or not an employee, at the time of his injuries, is engaged in maritime employment within the meaning of the Act, as is the fact that an "employer" may be an entity other than a railroad. The 1972 Amendments addressed themselves to the unseaworthiness remedy in order to

eliminate the stevedore's liability in an indemnification action by the shipowner who in turn had been held liable to a longshoreman for the unseaworthiness of its (the shipowner's) vessel. Under the new Act, an "employee" no longer has a right of action against the vessel for unseaworthiness, but only for simple negligence. Any negligence of the stevedore is not imputed to the ship. Thus, the longshoreman injured aboard a vessel is placed in the same position as a longshoreman on the land as far as his right of action against third parties is concerned.

Petitioner unduly confines the tests of maritime employment used by the Virginia Supreme Court. Those tests are a realistically significant relationship to the traditional work of loading cargo on ships or a direct involvement in such loading process. On the facts of the case then before it, the Virginia Supreme Court interpreted these tests to mean that Ralph White, to be covered under the Act, would have had to actually handle cargo, manually or mechanically. Expressly distinguished was the work being performed by Blundo, (A. 13, fn. 2, petition for a writ of certiorari).

The petitioner then attempts to describe the alleged disparities which would result if the Virginia Supreme Court's decision is allowed to stand. Some disparities will arise and will continue to arise so long as there is any status requirement in the Act. They will continue to arise so long as "maritime employment" is not construed to mean "any employment." What

petitioner perceives as the uncertain boundary of coverage is but an outgrowth of the less-than-precise meaning of "maritime employment." However, the difficulty in applying the requirement to a given set of facts does not justify not applying it at all.

In a footnote, petitioner alludes to various claims by its employees under the Act or to FELA cases pending in various courts, none of which is in fact or properly would be a part of the record before this Court. Petitioner and the courts in which the FELA cases are being heard now have this Court's Caputo opinion to guide them and presumably will conduct themselves in accordance therewith. To allay petitioner's indecision is hardly a reason for granting review contemplated by Rule 19, Supreme Court Rules.

CONCLUSION

In no sense was Ralph White engaged in maritime employment at the time he suffered his injuries. He was not engaged in work customarily considered to be a part of any of the occupations specified in the Act. He was not a member of any of these occupational categories. He was not doing work which traditionally has been considered maritime activity. He was not directly involved in the loading or unloading process. For these reasons, the petition for a writ of certiorari should be denied. If this Court is inclined to grant certiorari, however, the case should be remanded to the Virginia Supreme Court

so that that court may have an opportunity to reconsider its decision in light of Caputo.

Respectfully submitted,

HENRY E. HOWELL, JR.
J. GRAY LAWRENCE, JR.
Howell, Anninos,
Daugherty & Brown
808 Maritime Tower
Norfolk, Virginia
23510

Counsel for Respondent

August 12, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of August, 1977, three copies of the foregoing Brief in Opposition were mailed, postage prepaid, to all counsel of record for the Petitioner. I further certify that all parties required to be served have been served.

J. GRAY LAWRENCE, JR.
808 Maritime Tower
Norfolk, Virginia
23510

Counsel for Respondent